A

PUNITHAVATHI PONNIAH

v.

GANENDRA TORQUIL PONNUSAMY GANENDRA & ANOR

B

COURT OF APPEAL, PUTRAJAYA
CLEMENT SKINNER JCA
LIM YEE LAN JCA
ROHANA YUSUF JCA
C [CIVIL APPEAL NO: W-02(IM)-1604-07-2010]
7 OCTOBER 2013

CIVIL PROCEDURE: *Bill of costs - Taxation - Accrual of cause of action - Application to tax bill of costs - Whether bill of costs filed within time - Whether application to tax bill of costs fell within purview of s. 6(1) of the Limitation Act 1953 - Whether limitation period applied*

D

The appellant together with one Loong Caesar were appointed as executors and trustees of the estate of one P Ganendra, ('the deceased'). Goh Mary, the wife of the deceased commenced this suit for the removal of the appellant and Loong Caesar as the executors and trustees of the estate. On 25 August 2004 the parties entered into a consent order ('consent order of 25 August 2004'). However, on 3 May 2005, the consent order of 25 August 2004 was set aside pursuant to O. 42 r. 13 of the Rules of the High Court 1980 ('RHC'). On appeal, the Court of Appeal set aside the order of 3 May 2005 and made a consequential order allowing the parties to apply within 14 days to the High Court to set aside the consent order of 25 August 2004. Accordingly, the appellant made an application to the High Court to set aside the consent order of 25 August 2004 but the application was dismissed on 13 November 2006. Initially, the appellant took steps to tax her costs by serving a bill of costs dated 31 March 2011 to Goh Mary. On hearing of the bill of costs, Goh Mary raised a preliminary objection that the consent order of 25 August 2004 did not specify that Goh Mary was to solely bear the appellant's costs. The Senior Assistant Registrar ('SAR') upheld Goh Mary's preliminary objection and ordered that the appellant's costs be borne by the deceased's estate. The appellant appealed against the decision of the SAR but the appeal was dismissed. Subsequently the appellant filed her bill of costs dated 29 December 2011 addressed to the administrators of the

E

F

G

H

I

deceased's estate. The respondents applied to strike out the appellant's notice of taxation and bill of costs dated 29 December 2011, on the ground that limitation had set in pursuant to s. 6(1) of the Limitation Act 1953 ('Limitation Act') and that there was excessive delay in filing the bill of costs which had caused laches and acquiescence to apply against the appellant. However, the appellant contended that the application to tax the bill of costs did not fall within s. 6(1) of the Limitation Act and her application was not 'an action' which was brought after the expiration of six years from the date on which the 'cause of action accrued'. The appellant further contended that it was only on 17 November 2011 that the court ordered that the party to be taxed pursuant to the consent order was the administrators of the deceased's estates. As such, the application to tax the bill of costs was not filed out of time even if s. 6(1) of the Limitation Act applied and there was no delay as the appellant was involved in the various appeals and applications to have the consent order set aside.

Held (allowing appeal with costs)
Per Clement Skinner JCA delivering the judgment of the court:

(1) Section 2 of the Limitation Act defined the word 'action' to include a suit or any other proceedings in a court of law. Although an application to tax a bill of costs was not a suit, it could be described as a proceeding in a court. An application for taxation was a proceeding founded on a contract or was a proceeding to enforce an award, thus the court must consider whether the application was made after the expiration of six years from the date on which the cause of action accrued. (paras 22 & 23)

(2) The matter as to who would pay the costs of the appellant, was resolved on 17 November 2011 when the court held that the costs must be borne by the deceased's estate. Accordingly, it was from 17 November 2011 that there existed the party who could be sued for the appellant's costs and when all the facts had happened which were material to be proved to entitle the plaintiff to succeed in taxing her costs against the deceased's estate. Thus 17 November 2011 was the date on which the cause of action accrued to the appellant to have her costs taxed, based on the consent order of 25 August 2004. (para 26)

(3) It was not agreeable that the consent order of 25 August 2004 was enforceable from the day it was made or on the day it was reinstated by the Court of Appeal. The appellant's application to have the bill of costs taxed was filed well within six years. After the consent order of 25 August 2004 was made, it was set aside by the same judge who granted it, which then led to an appeal and finally another setting aside application being filed. Therefore, the appellant had not delayed in applying to tax her costs and the doctrine of laches would not be applied against the appellant. (paras 28 & 29)

Bahasa Malaysia *Translation Of Headnotes*

Perayu bersama-sama dengan Loong Caesar telah dilantik sebagai wasi dan pemegang amanah bagi harta pusaka P Ganendra, ('si mati'). Goh Mary, isteri si mati, telah memulakan tuntutan ini untuk menyingkirkan perayu dan Loong Caesar sebagai wasi dan pemegang amanah harta pusaka tersebut. Pada 25 Ogos 2004, pihak-pihak telah memasuki suatu perintah persetujuan ('perintah persetujuan 25 Ogos 2004'). Walau bagaimanapun, pada 3 Mei 2005 perintah persetujuan bertarikh 25 Ogos 2004 telah diketepikan menurut A. 42 k. 13 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Atas rayuan, Mahkamah Rayuan telah mengenepikan perintah bertarikh 3 Mei 2005 dan membuat perintah berbangkit dengan membenarkan pihak-pihak untuk memohon dalam tempoh 14 hari kepada Mahkamah Tinggi untuk mengenepikan perintah persetujuan 25 Ogos 2004. Oleh itu, perayu telah membuat permohonan ke Mahkamah Tinggi untuk mengenepikan perintah persetujuan 25 Ogos 2004 tetapi permohonan tersebut telah ditolak pada 13 November 2006. Pada mulanya, perayu telah mengambil langkah untuk pentaksiran kosnya dengan menyampaikan suatu bil kos bertarikh 31 Mac 2011 kepada Goh Mary. Goh Mary telah membangkitkan bantahan awal bahawa perintah persetujuan 25 Ogos 2004 gagal menyatakan sama ada Goh Mary harus menanggung kos perayu secara tunggal. Penolong Kanan Pendaftar ('PKP') telah mengekalkan bantahan awal Goh Mary dan memerintahkan bahawa kos perayu ditanggung oleh harta pusaka si mati. Perayu telah merayu terhadap keputusan PKP tetapi rayuanya telah ditolak. Seterusnya, perayu telah memfailkan bil kos bertarikh 29 Disember 2011 yang ditujukan kepada pentadbir harta pusaka si mati. Pihak responden telah memohon untuk membatalkan notis pentaksiran dan bil kos bertarikh 29 Disember 2011, atas alasan bahawa ia telah dihadkan masa menurut s. 6(1) Akta Had Masa 1953 ('Akta Had Masa')

dan terdapat kelewatan untuk memfailkan bil kos yang telah menyebabkan kelengahan dan persetujuan terpakai kepada perayu. Namun, perayu berpendapat bahawa permohonan untuk pentaksiran bil kos tidak termasuk dalam s. 6(1) Akta Had Masa dan permohonannya bukanlah suatu 'tindakan' yang dibawa selepas tamat tempoh enam tahun dari tarikh di mana 'kausa tindakan yang terakru'. Pihak perayu selanjutnya menghujahkan bahawa mahkamah telah pada 17 November 2011 memerintahkan bahawa pihak yang harus ditaksir menurut perintah persetujuan adalah pentadbir harta pusaka si mati. Oleh itu, permohonan untuk pentaksiran bil kos tidak difailkan di luar had masa walaupun s. 6(1) Akta Had Masa digunapakai dan tiada kelewatan yang berlaku kerana perayu terlibat dalam pelbagai rayuan dan permohonan untuk mengenepikan perintah persetujuan tersebut.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Clement Skinner HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 2 Akta Had Masa mendefinisikan perkataan 'tindakan' sebagai bermaksud sesuatu guaman atau apa-apa prosiding lain dalam mahkamah. Walaupun permohonan pentaksiran bil kos bukanlah suatu tindakan, ia adalah suatu prosiding di mahkamah. Permohonan pentaksiran adalah prosiding yang diasaskan atas kontrak atau adalah suatu prosiding untuk menguatkuasakan award dan mahkamah perlu mengambil kira sama ada permohonan tersebut dibuat selepas tamat tempoh enam tahun dari tarikh kausa tindakan tersebut terakru.

(2) Perkara mengenai siapa yang perlu membayar bil kos perayu telah diselesaikan pada 17 November 2011 apabila mahkamah memutuskan bahawa kos harus ditanggung oleh pentadbir harta pusaka si mati. Oleh itu, hanya pada 17 November 2011 wujud pihak yang boleh disaman untuk kos perayu dan apabila semua fakta-fakta telah berlaku dan adalah material untuk dibuktikan untuk membolehkan perayu berjaya dalam mentaksir kos ke atas pentadbir harta pusaka si mati. Oleh itu 17 November 2011 merupakan tarikh di mana kausa tindakan perayu yang terakru untuk membolehkan kos ditaksir, berdasarkan perintah persetujuan 25 Ogos 2004.

(3) Tidak dipersetujui bahawa perintah persetujuan 25 Ogos 2004 boleh dilaksanakan dari hari ia dibuat atau pada hari ia dihidupkan semula oleh Mahkamah Rayuan. Permohonan

perayu untuk pentaksiran bil kos telah difailkan dalam lingkungan tempoh enam tahun. Setelah perintah persetujuan 25 Ogos 2004 dibuat, ia telah diketepikan oleh hakim yang memberikannya, yang kemudiannya membawa kepada rayuan dan akhirnya satu lagi permohonan pengenepian telah difailkan. Oleh itu, perayu tidak terlambat dalam permohonan pentaksiran kos dan doktrin kelewatan tidak akan terpakai terhadap perayu.

Case(s) referred to:

Credit Corp (M) Bhd v. Fong Tak Sin [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 SC ***(refd)***

Ganapathy Chettiar v. Lum Kum Chum & Ors; Meenachi v. Lum Kum Chum & Ors [1981] 1 LNS 59 FC ***(refd)***

Sime Finance Ltd v. Robin Woon Kim Yan [1997] 2 CLJ Supp 370 HC ***(refd)***

Legislation referred to:

Limitation Act 1953, ss. 2, 6(1)(a), (b)

Probate and Administration Act 1959, s. 43

Rules of the High Court 1980, O. 18 r. 19(1)(b), (d), O. 42 r. 13, O. 59 r. 7(2)(c)

Trustee Act 1949, s. 46

For the appellant - Rajvinder Singh; M/s Dennis, Nik & Wong

For the 1st & 2nd respondents - S Kanaga Sundran; M/s Raja Seelan & Assocs

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S2-22-565-2000]

Reported by Sandra Gabriel

JUDGMENT

Clement Skinner JCA:

[1] We had earlier allowed the appeal of Punithavathi @ Pushpambigai Ponniah ("the appellant") against the decision of the learned High Court Judge who on 21 June 2012 allowed the application of Ganendra Torquil @ Torkil a/l Ponnusamy Ganendra and Dennis Ganendra ("the first and second respondents") to strike out the appellant's notice of taxation and bill of costs dated 29 December 2011, on the ground that limitation had set in. We now give our reasons for our decision.

Brief Facts

[2] The appellant together with one Loong Caesar were appointed as executors and trustees of the estate of one P Ganendra, deceased. In the year 2000 Goh Mary as the wife of the late Ganendra commenced this suit as plaintiff, for the removal of the appellant and Loong Caesar as the executors and trustees of the estate. They were named as first and second defendants respectively in the suit. The other beneficiaries of the estate were named as the third and eighth defendants.

[3] On 25 August 2004 the parties entered into a consent order before Dato' Tee Ah Sing J (as he then was). The material terms of the consent order were *inter alia* as follows:

(i) The appellant ie, the first defendant as well as the second defendant be discharged as the executrix and trustee of the deceased's estate;

(ii) The respondents here ie, third and sixth defendants in the suit were thereafter appointed as the administrators of the deceased's estate;

(iii) The appellant's ie, first defendant's costs be agreed by the parties or taxed by the court and paid to the appellant/first defendant; and

(iv) The appellant's/first defendant's remuneration as executrix and trustee of the deceased's estate be taxed by the court in accordance with s. 43 of the Probate and Administration Act 1959 and/or s. 46 of the Trustee Act 1949.

[4] On 3 May 2005 the consent order dated 25 August 2004 was set aside by Dato' Tee Ah Sing J pursuant to O. 42 r. 13 of the then Rules of the High Court 1980 ("RHC") on the ground that the court lacked jurisdiction to make such an order and that the action be returned to the cause list.

[5] On appeal against Dato' Tee Ah Sing's decision of 3 May 2005, the Court of Appeal on 22 September 2005 set aside the order dated 3 May 2005 and made a consequential order allowing the parties to apply within 14 days to the High Court to set aside the consent order dated 25 August 2004, which application if made, was to be heard before another judge.

[6] On 6 October 2005 pursuant to the Court of Appeal's order dated 22 September 2005 appellant/first defendant did make an application to the High Court to set aside the consent order of 25 August 2004. On 13 November 2006 Dato' Wan Adnan bin Muhammad J (as he then was) dismissed the application.

[7] Initially the appellant took steps to tax her costs by serving a bill of costs dated 31 March 2011 addressed to the plaintiff Goh Mary. On hearing of the bill of costs the plaintiff raised a preliminary objection that the consent order of 25 August 2004 did not specify that Goh Mary was to solely bear the appellant's first defendant's costs.

[8] On 23 August 2011 the Senior Assistant Registrar who heard the matter upheld Goh Mary's preliminary objection and ordered that the appellant's/first defendant's costs be borne by the deceased's estate.

[9] The appellant/first defendant appealed against the decision of the Senior Assistant Registrar to the judge in chambers. On 17 November 2011 Hue Siew Kheng J dismissed the appeal of the appellant/first defendant and affirmed the decision of the Senior Assistant Registrar that the costs of the appellant be borne by the deceased's estate.

[10] Then the appellant/first defendant filed her bill of costs dated 29 December 2011 addressed to the respondents/third and sixth defendants as administrators of the deceased's estate.

[11] On 20 March 2012 the respondents applied to have the appellant's bill of costs struck out on the grounds that:

(i) It is scandalous, frivolous and vexations or otherwise an abuse of the process of the court under O. 18 r. 19(1)(b) or (d);

(ii) The bill of costs be dismissed pursuant to s. 6(1) of the Limitation Act 1953;

(iii) There was excessive delay in filing the bill of costs such that laches and acquiescence apply against the appellant;

(iv) Alternatively if the bill of costs is not dismissed the consent order of 25 August 2004 be clarified as to whether the third & sixth defendants are liable to pay the costs pursuant to the consent order.

Decision Of The High Court

[12] On 21 June 2012 the learned High Court Judge allowed the respondents' application and ordered that the appellant's bill of costs to be struck out, but we do not have the benefit of the learned judge's reasons for doing so.

This Appeal

[13] We find it more convenient to deal with the case of the respondents first, being the party who applied to strike out in the High Court. It is their contention that in *Ganapathy Chettiar v. Lum Kum Chum & Ors; Meenachi v. Lum Kum Chum & Ors* [1981] 1 LNS 59; [1981] 2 MLJ 145 the Federal Court held that an order by consent is evidence of the contract between the parties and is binding on all the parties to the order. Therefore, according to the respondents, two consequences flowed from the making of the consent order in this case: (a) it came into force and effect from the day it was made ie, 25 August 2004 and is deemed valid until it is set aside. The appellant contends that even though Dato' Tee Ah Sing J set aside the consent order on 3 May 2005, the Court of Appeal reinstated the consent order on 22 September 2005. Therefore at the very latest, the consent order continued to remain in full force and effect from 22 September 2005; and (b) being a contract, the consent order attracted the provisions of s. 6(1) of the Limitation Act 1953 which reads:

> Limitation of actions of contract and tort and certain other actions:
>
> 6(1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:
>
> (a) actions founded on a contract or on tort;
>
> (b) actions to enforce a recognisance;
>
> (c) actions to enforce on award;
>
> (d) actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or of a sum by way of penalty or forfeiture.

[14] Hence it is the respondents' case that the six years limitation to bring an "action" founded on a contract or to enforce an award expired either on 24 August 2010 (if time is computed from

25 August 2004) or 21 September 2011 (if time is computed from 22 September 2005), but since the appellant's bill of costs was only filed in for taxation on 29 December 2011, it is barred by limitation.

[15] As an alternative argument, the respondents contended that the appellant's application should be defeated by laches as it was filed more than six years after the making of the consent order.

[16] The respondents made no attempt to address us on their reliance on O. 18 r. 19(1)(b) or (d) of the RHC.

[17] Turning now to the appellant's contentions, it is her case that her application to tax her bill of costs does not fall within any of the four limbs of s. 6(1) of the Limitation Act 1953. Neither was her application "an action" which was brought after the expiration of six years from the date on which the "cause of action accrued" as mentioned in s. 6(1).

[18] The appellant further contended that O. 59 of the then RHC do not contain any provisions regarding the time frame for the taxing of costs awarded to a party. The appellant contended that it was only on 17 November 2011 that the High Court ordered (per Hue Siew Kheng J) that the party to be taxed ie, responsible to pay the costs pursuant to the consent order was the administrators of the deceased's estates ie, the respondents here. Therefore the application to tax the bill of costs was not filed out of time even if s. 6(1) of the Limitation Act 1953 applies to the facts here.

[19] With regard to the alleged delay in having her costs taxed, the appellant contended there was no delay as the appellant was involved in the various appeals and applications to have the consent order set aside.

Our Decision

[20] Having considered the submissions of the parties, we allowed the appeal for the following reasons.

[21] The respondents while recognising that our then RHC do not provide a time frame for the taxing of costs, urged us to consider the position in England where under the then English Rules of the Supreme Court a party entitled to costs is required to begin taxation proceedings within three months after the

judgment or order is made or given. However, in *Sime Finance Ltd v. Robin Woon Kim Yan* [1997] 2 CLJ Supp 370; [1997] 5 MLJ 471 Suriyadi J (as he then was) declined to do so in the absence of any specific and express provisions in our rules, requiring a party to do so. We agree with the reasoning of the learned judge. Suriyadi J did go on to observe that apart from O. 59 r. 7(2)(c) of our RHC which requires that an applicant should not delay taxation proceedings unnecessarily, "only s. 6 of the Limitation Act 1953 places some kind of a curtailment on an unbridled period" to have costs taxed.

[22] Turning now to the question of limitation, ss. 6(1)(a) and (b) of the Limitation Act 1953 speak of "actions founded on a contract" and "actions to enforce an award". Section 2 of the same Act defines the word "action" to include "a suit or any other proceedings in a court of law". While an application to tax a bill of costs is not a suit, it can certainly be described as a proceeding in a court.

[23] But even if it can be argued that the application for taxation is a proceeding founded on a contract or is a proceeding to enforce an award, the court still has to consider whether the application was made "after the expiration of six years from the date on which the cause of action accrued".

[24] The respondents contended that the consent order became enforceable on the date it was made ie, 25 August 2004 or the date that order was reinstated by the Court of Appeal ie, on 22 September 2005 and therefore the six years began to run from either of these dates.

[25] We do not agree. What we are concerned with here is not so much the question of enforceability of an order of court, but with the date on which a cause of action accrues. In *Credit Corp (M) Bhd v. Fong Tak Sin* [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69, Hashim Yeop Sani CJ (Malaya) speaking for the then Supreme Court held at p. 76:

> As stated earlier a cause of action is said to have accrued when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed.

[26] Reverting to the facts of this case, the terms of the consent order are relevant and cannot be ignored. While there was in existence a person who can sue ie, the appellant, was there on 25 August 2004 or 22 September 2005 a person who could be sued for the appellant's costs? And, had all the facts happened which are material to be proved to entitle the appellant to succeed in her bid to have her costs taxed if brought on 25 August 2004 or 22 September 2005? We do not find so. It seems that in entering into the consent order the parties to the litigation had overlooked the point as to who would pay the costs of the appellant because when the appellant first took steps to tax her costs against the plaintiff Goh Mary on 31 March 2011, the latter objected on the ground that the consent order of 25 August 2004 did not state that she was to bear the costs. The matter was finally resolved on 17 November 2011 when Hue Siew Kheng J held that the costs must be borne by the deceased's estate. Accordingly it was from 17 November 2011 that there existed the party who could be sued for the appellant's costs and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed in taxing her costs against the deceased's estate. In our judgment the 17 November 2011 was the date on which the cause of action accrued to the appellant to have her costs taxed, based on the consent order of 25 August 2004.

[27] Alternatively, we are of the view that the earliest date a cause of action can be said to have accrued to the appellant based on the consent order of 25 August 2004 was on the 13 November 2006, when Dato' Wan Adnan bin Muhammad J dismissed the appellant's application (as first defendant in the suit) to set aside the consent order. We say so because even though the Court of Appeal had restored the consent order on 22 September 2005, the order made by the Court of Appeal expressly granted liberty for the parties to apply to the High Court to set aside the consent order of 25 August 2004 and the appellant (as first defendant in the suit) did avail herself to that opportunity which was decided on by Dato' Wan Adnan J on 13 November 2006. Accordingly it can be said that it was on that day when all the facts have happened which are material to be proved to entitle the plaintiff to succeed in taxing her costs, in that, it was on that day that the appellant had exhausted a right given to her in the Court of Appeal's order of 22 September 2005 to set aside the consent order of 25 August 2004.

[28] It is for the above reasons that we do not agree with the respondent's contention that the consent order of 25 August 2004 was enforceable from the day it was made or on the day it was reinstated by the Court of Appeal. The appellant's application to have her bill of costs taxed was filed well within six years of the 17 November 2011 or 13 November 2006.

[29] With regard to the question whether the appellant had delayed in applying to tax her costs and therefore caught by the doctrine of laches, we find the appellant was not delayed as alleged. The facts show that after the consent order of 25 August 2004 was made, it was set aside by the same judge who granted it, which then led to an appeal and finally another setting aside application being filed. We do not think that on the facts of this case it can be said that the doctrine of laches would apply against the appellant.

[30] With regard to the question of who should pay the appellant's bill of costs once taxed, that question was decided by Hue Siew Kheng J on 17 November 2011 and that order has not been set aside or stayed. Neither has that order been appealed against.

[31] It was for all the above reasons that we allowed the appeal with costs.